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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 841

FRED SPURLOCK,
Petitioner,

vs.

WM. F. STEER, Colonel, Infantry, United States Army, Provost Marshal, Central Pacific Area,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF AND ARGUMENT IN SUPPORT THEREOF.

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BRIEF AND ARGUMENT IN SUPPORT THEREOF.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Fred Spurlock, petitioner, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the final decree of said court entered November 6, 1944, reversing the judgment of the District Court of the United States for the Territory of Hawaii.

OPINIONS BELOW.

The decision of the district court (R. 35) is not reported.

This case was submitted to the Circuit Court of Appeals for consideration and decision on the oral arguments made and briefs filed in case No. 10763, Kahanamoku, Sheriff, etc., v. Duncan and case No. 10774, Steer, Colonel, etc., v. White. (R. 341.)

The Circuit Court of Appeals reversed the judgment of the district court herein upon the authority of its decision in the above-mentioned two cases. (R. 342, 343.)

SUMMARY OF PLEADINGS.

PETITION.

Petitioner avers in his petition for the writ of habeas corpus filed in the United States District Court of Hawaii May 16, 1944 (R. 4) that he is un-

lawfully restrained of his liberty by virtue of a sentence imposed by the Provost Court of Honolulu on March 28, 1942, for the offense of assault and battery with a deadly weapon.

Petitioner further avers that said provost court had no jurisdiction over him or the offense charged and refers to the previous decision of said district court in the case of White v. Steer (the same case referred to above under the heading "Opinions Below") to the effect that White, the petitioner and prisoner (who also had been sentenced to imprisonment by a provost court) was deprived of his constitutional rights under the Fifth and Sixth Amendments because (a) the provost courts purported to exercise jurisdiction derived from orders of the commanding general, who claimed requisite judicial power by a void delegation thereof from the Governor of the Territory; (b) the commanding general derived no authority to set up provost courts for the trial of civilians in March, 1942, because of the existence of martial law, since there was at that time no necessity for such trials in provost courts.

RETURN.

The respondent in his return (R. 10) admits petitioner's commitment by the provost court at Honolulu.

Respondent states that on December 7, 1941, the Governor of the Territory, acting under Section 67 of the Organic Act, by proclamation approved by the President, declared martial law and suspended the

writ of habeas corpus; that martial law continued and the suspension of the writ continued; and that, therefore, the court was without jurisdiction to issue the writ.

Respondent further states:

That the Governor of the Territory called upon the commanding general to prevent invasion, the general's proclamation of December 7, 1941 in response thereto, being made an exhibit to the return;

That pursuant to the Governor's suspension of the writ of habeas corpus and declaration of martial law the commanding general created provost courts to try offenses under criminal laws of the Territory;

That on December 7, 1941, the Territory of Hawaii was invaded and was in imminent danger of invasion and that public safety required the declaration of martial law and the suspension of the writ;

That at the time of petitioner's commitment the Territory was a part of a combat zone;

That because of the foregoing the provost court had jurisdiction of the petitioner and the offense;

That, in the honest belief of the general, military necessity required the trial of civilians including petitioner by provost court;

That the offense for which petitioner was tried was not cognizable in the United States District Court for Hawaii; and

That upon the declaration of martial law the commanding general became vested with judicial powers

of the Territory and that pursuant thereto territorial courts ceased to exercise their jurisdiction.

TRAVERSE.

In his traverse, petitioner states that on January 15, 1942, the provost court at Honolulu placed him on probation for five years for being intoxicated in *November, 1941;* that on March 24, 1942, petitioner attempted to defend himself against a knifing attack; that he was arrested and brought before the provost court on March 28, 1942; that he was sentenced by the provost court to five years of imprisonment without an opportunity to plead, without trial and without evidence against him.

Petitioner states that the writ of habeas corpus was restored by the Governor's proclamation of February 8, 1943; that there was no factual basis for its suspension at the time of petitioner's application for the writ, and further that even if the writ were suspended it was nevertheless available to civilians charged with offenses under territorial law not of a military nature, order prevailing at all times in the Territory.

SITUATION IN HONOLULU AT THE BEGINNING OF THE WAR FROM THE CIVILIAN'S STANDPOINT.

For many months prior to December 7, 1941, mock battles had taken place on the Island of Oahu. The people were accustomed to gun fire. Window panes rattled and dishes danced to the concussion.

On December 7, 1941, at about 8 A. M. shooting began again. Many Honolulans slept through it. Few people paid any attention to it. A group of English evacuees from the south who arrived in Honolulu Harbor during the worst of the firing exclaimed that the Americans practiced most strenuously.

Before noon and in the afternoon rumors of a Japanese attack began to be accepted. The attack centered on Pearl Harbor, Hickam Field and other military reservations which are outside the City of Honolulu at varying distances.

On Monday, December 8th, the people of Honolulu went about their tasks. Work had to go on. And there was nothing to prevent it. No place of business had been damaged. No one had been injured. There was no commotion except in the activity of the Army and Navy, and no disorder. Although fearful of another attack everyone relied on the armed forces to deal with the enemy. Business, public and private, went on as usual.

FACTS RELATING TO THE JUDICIAL ROLL OF THE COMMANDING GENERAL.

(Exhibits listed R. 64-68 not designated for printing, R. 335, hence omission of record references.)

There was a long calendar of criminal cases to be disposed of in the District Court of Honolulu on December 8, 1941. The court opened as usual and attended to its business. (R. 170.) The United States District Court tried a criminal case. All Territorial courts in Honolulu were open.

At noon on December 8th, however, the chief justice, under directions of the commanding general closed the courts by edict. Although the general permitted the courts to resume ten days later, on December 18, 1944, and before petitioner's imprisonment, on March 28, 1944, in the partial exercise of their jurisdiction. (General Order No. 29.) On January 27, 1942 the general recognized further jurisdiction in the courts still, exclusive, however, of criminal cases. (General Order No. 57.)

Presumably in conformity with previous arrangements made by the War Department, the Governor of the Territory, on December 7, 1941, abdicated in favor of the commanding general, Hawaiian department, and at the same time purported to transfer to the general the powers of the courts of the Territory and the counties and cities therein. (This purported delegation of judicial powers by the executive is assumed herein to be invalid.) The Governor also suspended the writ of habeas corpus and declared martial law.

By virtue of the judicial powers thus conferred on him the general set up provost courts to try civilians charged, among other things, with offenses under territorial statutes. (Rec. 53, District Court's opinion.) The district court said: "The only way the general ever claimed the judicial powers of the Territorial courts was by the Governor's delegation of them (R. 53)". There was no suggestion of military necessity and no claim of authority by virtue of martial law, the respondent's return to the contrary notwithstanding. Such was the beginning of the military regime in the judicial field.

PETITIONER'S IMPRISONMENT.

Petitioner, a civilian residing in the Territory of Hawaii, not subject to the laws of war, was sentenced by the provost court at Honolulu, T. H., on March 28, 1942, to imprisonment for five years, for the offense of assault and battery with a deadly weapon, contrary to Section 5656 Revised Laws of Hawaii, 1935. (Return to writ of habeas corpus, Rec. 10.) Respondent does not dispute petitioner's testimony that no evidence was offered against petitioner but states in his return that petitioner pleaded guilty. (R. 10.) The trial court found, as a fact, that petitioner did not plead guilty (R. 41), and, further, that petitioner was found guilty without trial. (R. 42.) In short, petitioner was arrested and, without more, was sentenced to five years of imprisonment.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered on November 6, 1944. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C. 347.)

QUESTIONS PRESENTED.

Assuming the provost court, which sentenced petitioner, had jurisdiction both of the alleged offense and the petitioner, was its disposition of petitioner's case legal?

Did the provost court which sentenced petitioner have jurisdiction so to do?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

A. As distinguished from an unfair trial petitioner had no trial at all.

B. Provision in Section 67, Organic Act of the Territory for the declaration of martial law does not contemplate or authorize army usurpation of the territorial government as held by the Circuit Court of Appeals.

C. The suspension of the writ of habeas corpus in the Territory of Hawaii after December 7, 1941, and at the time of petitioner's application for the writ, was defended under Section 67, Organic Act of the Territory on the ground that invasion of the Hawaiian Islands was imminent as provided in Section 67. Whereas, the Constitution provides: "The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety requires it". The Constitution has the same force and effect in the Territory of Hawaii as elsewhere in the United States. (Organic Act, Sec. 5.)

D. The Circuit Court of Appeals has decided an important question of constitutional law relating to the rights of an individual under the Fifth and Sixth Amendments in war time and has decided the same contrary to a decision of this court.

The decision of the Circuit Court of Appeals, in reversing the trial court and holding that petitioner, a

civilian charged with violation of a municipal law, viz.: Assault and battery with a deadly weapon, was subject to trial and imprisonment by a military court, is in conflict with the decision of this court in *Ex Parte Milligan*, 4 Wall. (U.S.) 2.

E. The diverse views expressed in the three opinions of the Circuit Court of Appeals leave unsettled questions involving national security in juxtaposition with individual rights under the constitution in the *terra incognita* of war time martial law.

BRIEF AND ARGUMENT.

I.

PETITIONER HAD NO TRIAL IN PROVOST COURT.

The Circuit Court of Appeals, in its opinion in the *White* and *Duncan* cases, says:

> "There was nothing in the showing made in either of these cases which would warrant release on habeas corpus on grounds having to do with the fairness of the trials in the provost courts. Nor did the court below make any finding of unfairness in the conduct of the trials." (R. 364.)

The Circuit Court of Appeals reversed the district court in this case on authority of its decision in the *White* and *Duncan* cases. (R. 342.) Although, as against the above quoted portion of its decision, the trial court in the instant case not only made a finding of unfairness in the conduct of petitioner's purported trial in the provost court, but also made a finding that petitioner had no trial at all. (R. 41, 42.)

It would make no difference that the provost courts were validly constituted. For they were created by General Order No. 4, which provides for trials, etc. Here there was no trial. The district court so held. (R. 42.)

It may be conceded that the trial procedure of a provost court is for it to determine, and further that the kind of justice it dispenses is also for it to determine. But it is a *non sequitur* that they may issue *lettres de cachet*. The petitioner was arrested and imprisoned. Between his arrest and his imprisonment nothing transpired except time. The arresting officer might have taken petitioner to prison immediately after arrest without aggravating the illegality of petitioner's imprisonment as actually effected.

The Circuit Court of Appeals would have affirmed the district court if it had adverted to the character of petitioner's purported trial. (R. 364.)

II.

NO AUTHORITY UNDER ORGANIC ACT FOR GENERAL'S ASSUMPTION OF JUDICIAL POWERS.

Section 67, Hawaiian Organic Act, is as follows:

> "That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse

> comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known. (48 U. S. C. A. 532.)"

The Organic Act of the Territory of Hawaii is entitled "An Act to Provide a Government for the Territory of Hawaii". In providing for the governance of the Territory, Congress followed the general pattern of state governments. It is significant that Congress conferred upon the Chief Executive the powers formerly exercised by the President of the Republic of Hawaii not inconsistent with the Constitution. (Organic Act, Sec. 68.) Congress vested executive power of the government of the Territory in the Governor (Organic Act, Sec. 66), and conferred on him the power to declare martial law (Organic Act 67), which is an incident of sovereignty. The power to declare martial law carries with it the right and obligation to administer and enforce martial law. It is a means of discharging the Chief Executive's responsibility.

Pursuant to the declaration of martial law by the Governor, says the respondent in his return (R. 13), the commanding general set up provost courts. (In the *White* case, No. 10,774, this same respondent predicted the general's authority to set up provost

courts on the Governor's delegation to him of the judicial powers of the Territory. That the general did rely on such purported delegation of judicial powers in setting up provost courts was found as a fact by the district court. (R. 53.) The sole question, therefore, on this record is whether the general derived requisite authority from the declaration of martial law.

Although the Governor is not expressly authorized to call in Army and Navy commanders to assist in enforcing martial law, it is assumed that an emergency might be serious enough to warrant the summoning of any available assistance, including the armed forces. But such auxiliary agency, so called on by the Governor would not thereby acquire the right to supersede the Governor, as its principal, as well as the judicial and legislative branches of the government.

It is to be noted that Army and Navy commanders are listed in Section 67, Organic Act, along with the *posse comitatus* and the militia as subject to the Governor's call to prevent invasion. If this same group may be called on to enforce martial law, each would be on a parity with the other in the task assumed. The Army and Navy would have no better right to arrogate to themselves the functions of the territorial government because of their assigned task, than would the militia or the *posse comitatus*. And the Army's act in so doing is comparable from a legal standpoint with the same act, had it been done by the *posse comitatus*.

It is significant, if not decisive, that the limited military aspect of west coast states was derived from emergency action by the executive and legislative branches of the government in the exercise of their war powers. Whereas the Territory of Hawaii, enjoying the protection of all constitutional safeguards, was obliterated and in lieu thereof a military dictatorship set up as an expedient of war under the guise of an agency to assist in a function of the territorial government.

III.

IMMINENT DANGER OF INVASION AS GROUND FOR SUSPENSION OF WRIT OF HABEAS CORPUS.

Section 67 of the Organic Act is in conflict with Article I, Section 9 of the Constitution in so far as it provides for the suspension of the writ in case of imminent danger of invasion, in which case the writ was suspended in Hawaii.

Section 5 of the Organic Act extends the Constitution to the Territory of Hawaii with the same force and effect as elsewhere in the United States. The conflict between Section 67 and Section 5 is resolved in favor of the latter section in the September, 1944, Columbia Law Review at page 659 in the following language:

> "Section 5 of the Organic Act finds its general origin in the language of the Joint Resolution of Annexation which took effect in July, 1898. The Organic Act was introduced in the same term of Congress but it was not until the next Session,

that it was acted upon. The House report on the bill in the 56th Congress stated that Section 5 was included to avoid any possible question that the Constitution extended to Hawaii. It stated further that Section 1891 of the Revised Statutes would give the same result but that the clause had been included out of an abundance of caution. Section 1891, a general statute similar to Section 5, was then in the laws of eight of the Territories in the continental United States. It is obvious that Congress meant to apply a well-established general principal by its establishment of Section 5 in a form which customarily meant exactly what it said without any modification at all."

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS OVERRULES EX PARTE MILLIGAN, 71 U. S. 2.

Assuming, contrary to petitioner's contentions, that the petitioner had a fair trial in the provost court and that the authority of the commanding general under martial law was supreme within limits of necessity, the general exceeded his authority in setting up military tribunal to try civilians not subject to the laws of war, for offenses under municipal law, because the courts of the Territory were capable of functioning.

Ex Parte Milligan, 71 U. S. 2.

V.

IMPORTANCE OF QUESTIONS INVOLVED AND DIVERS VIEWS OF LOWER COURT WARRANT ALLOWANCE OF WRIT OF CERTIORARI.

It is believed that the discretion of this court in granting the writ of certiorari (*American Construction Co. v. Jacksonville, etc., R. Co.*, 148 U. S. 372) will be exercised in favor of petitioner under the rule laid down in *Forsyth v. Hammond* 100 U. S. 506.

A pertinent passage of the opinion in the latter case is quoted because of its peculiar appositeness: "* * * (The Court's power to grant the writ will be exercised) when the circumstances of the case satisfy us that the importance of the question involved * * * or some matter affecting the interests of this nation in its internal or external relations demands such exercise * * *".

Wherefore, petitioner prays that a writ of certiorari issue out of and under the seal of this honorable court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that court to certify to and send to this court for its review and determination a full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled in its docket as "No. 10,827, Wm. F. Steer, Colonel, etc., Appellant, v. Fred Spurlock, Appellee" and that the decree of said court be reversed by this court and that

the judgment of the United States District Court for the Territory of Hawaii be affirmed.

Dated, Honolulu, Hawaii,
January 8, 1945.

Respectfully submitted,
FRED SPURLOCK,
Petitioner,
By FRANCIS M. BROOKS,
Counsel for Petitioner.

BRAHAN HOUSTON,
Of Counsel.

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No. 841

In the Supreme Court of the United States

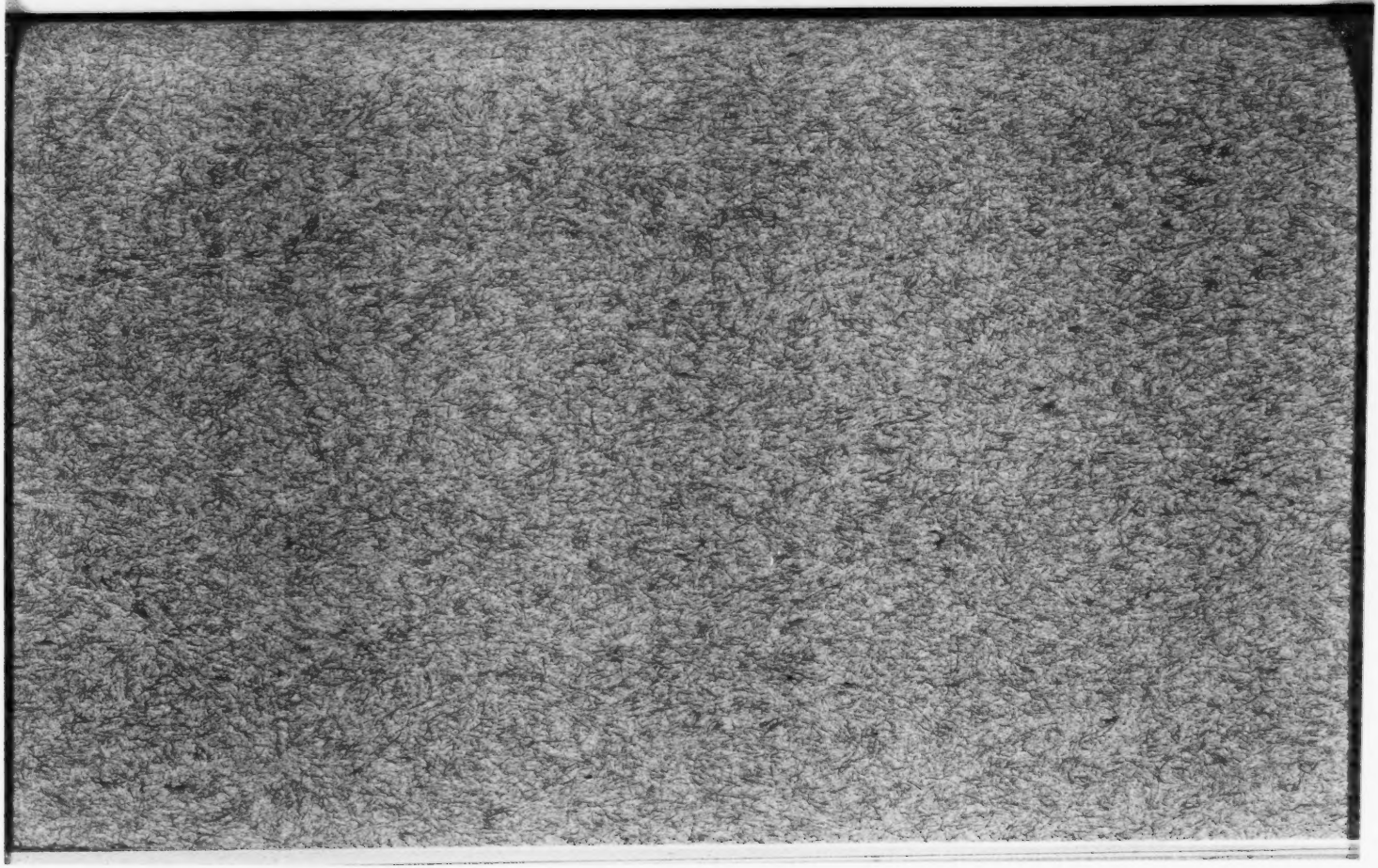
FRED STUBLOCK, PETITIONER

vs.

WM. F. STRER, COLONEL, INFANTRY, UNITED STATES ARMY, PROVOST MARSHAL, CENTRAL PACIFIC AREA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

SUGGESTION THAT THE CAUSE HAS BECOME MOOT



In the Supreme Court of the United States

No. 841

FRED SPURLOCK, PETITIONER

vs.

WM. F. STEER, COLONEL, INFANTRY, UNITED STATES ARMY, PROVOST MARSHAL, CENTRAL PACIFIC AREA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

SUGGESTION THAT THE CAUSE HAS BECOME MOOT

The Solicitor General, on behalf of the respondent, respectfully suggests to the Court that the cause has become moot. The War Department advises that Lt. Gen. Robert C. Richardson, Jr., Commanding General, United States Army Forces, Pacific Ocean Areas, issued an order on February 3, 1945, remitting the unexecuted portion of the petitioner's sentence. On March 28, 1942, the petitioner began service of a five year sentence imposed by the Provost Court, Honolulu, Hawaii, for assault with a dangerous

weapon in violation of Section 5656 of the Revised Laws of Hawaii, 1935 (R. 23). Thereafter the sentence was reduced to two and a half years (R. 144–145). On May 26, 1944, the petitioner was released from custody on a writ of habeas corpus and on a bond of $500 in this proceeding (R. 27); at that time approximately four months of his sentence remained to be served. Since the petitioner is no longer subject to the respondent's custody, he is not restrained of his liberty by the respondent. *Zimmerman* v. *Walker*, 319 U. S. 744; *Tornello* v. *Hudspeth*, 318 U. S. 792; *Weber* v. *Squier*, 315 U. S. 810.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

FEBRUARY 1945.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM IN SUPPORT OF SUGGESTION OF MOOTNESS

In the Supreme Court of the United States

OCTOBER TERM, 1944

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FRED SPURLOCK, PETITIONER

vs.

WM. F. STEER, COLONEL, INFANTRY, UNITED STATES ARMY, PROVOST MARSHAL, CENTRAL PACIFIC AREA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM IN SUPPORT OF SUGGESTION OF MOOTNESS

The Solicitor General on behalf of the respondent has suggested to the Court that this cause has become moot by reason of an order issued February 3, 1945, by Lieutenant General Robert C. Richardson, Jr., Commanding General, United States Army Forces, Pacific Ocean Areas, remitting the unexecuted portion of the sentence of imprisonment imposed upon the petitioner by the Provost Court, Honolulu, T. H., pursuant to which he was held in the respondent's custody at the time of the issuance of the writ of habeas corpus. In reply to this suggestion, the petitioner contends that General Richardson's order of remission exceeded his authority

as Commanding General and that the cause has therefore not been rendered moot or, in any event, that the issue as to mootness is sufficiently doubtful to warrant consideration upon briefs and oral argument.

We submit that the cause has become moot, regardless of the validity of the remission of sentence, and that, in any event, the order of remission was within the authority of the Commanding General.

1. The office of the writ of habeas corpus is to provide a judicial inquiry into the "cause of restraint of liberty." To sustain the writ there must be actual restraint and the restraint must be illegal. *McNally* v. *Hill*, 293 U. S. 131; *Wales* v. *Whitney*, 114 U. S. 564. Similar considerations determine the vitality of a habeas corpus proceeding on appeal. *Zimmerman* v. *Walker*, 319 U. S. 744; *Tornello* v. *Hudspeth*, 318 U. S. 792; *Weber* v. *Squier*, 315 U. S. 810; cf. *St. Pierre* v. *United States*, 319 U. S. 41, 42. Where, as here, the writ was sustained by the District Court and the petitioner enlarged upon his bond, the determinative question is whether he would any longer be restrained of his liberty but for the issuance of the writ. As the result of General Richardson's order of remission, whether it is valid or not, the respondent no longer asserts authority to subject the petitioner to restraint. If the cause were remanded, in accordance with the judgment of the Circuit Court of Appeals (R. 388), the respondent would decline to

receive the petitioner into custody. Under these circumstances, the cause is in the same posture as if the petitioner had been released pursuant to the order of remission prior to filing his petition for the writ. It is wholly immaterial that the District Court has continued the petitioner's bond pending the action of this Court. The petitioner's liberty is not restrained by the condition of the bond that he attend the final action of the court. The decisive consideration is that the respondent no longer claims to exercise any restraint, present or future, upon the petitioner's liberty.

2. The Commanding General was, in any event, authorized to issue the order of remission.

The petitioner's challenge to the validity of the order rests on the provision of Article II, Section 2 of the Constitution that the President "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." In 1888 Attorney General Garland expressed the view that the Articles of War could not, consistently with this authority of the President, authorize military officers to "pardon or mitigate" punishment adjudged by court martial after the sentence has been confirmed (Op. Atty. Gen., vol. 19, p. 106). This opinion was rejected, however, by the military authorities (see Winthrop, Military Law and Precedents (1920), p. 468, n. 90; Army Regulations (1889) par. 1044); and the military practice has been to the contrary both before

the opinion and since. See, *e. g.,* Davis, Military Law (1898), p. 209; Winthrop's Digest of Opinions of the Judge Advocate General (1895), p. 130; Digest of Opinions of the Judge Advocate General (1912), p. 177; *id.* (1912–1940), p. 251. Congress has likewise disregarded the opinion by expressly affirming a power to remit in the modern Articles of War (Articles 50, 52, 10 U. S. C. 1521, 1524). Moreover, since the beginning of the Republic Congress has authorized executive officers other than the President to remit fines, penalties, and forfeitures imposed for violation of the laws of the United States. In *The Laura,* 114 U. S. 411, this Court rejected the contention that such statutes conflict with the President's constitutional authority. The decision is inconsistent with the reasoning of Attorney General Garland's opinion which, indeed, if accepted, would imperil the validity of the statutory system of parole. Whether remission partakes of judicial or executive action (cf. *United States* v. *Benz,* 282 U. S. 304, 311), historical considerations, deemed to be controlling in *The Laura,* are equally dispositive here. If remission is constitutionally valid where expressly sanctioned by statute, it cannot be barred by the constitutional provision merely because the power to punish arises as an implied attribute of command. Needless to say, the issue does not involve any derogation from the President's authority since he may pardon or reprieve in any event and, further, since

he exercises ultimate control in his capacity as Commander in Chief.

3. Were the cause not moot, for the reasons stated, the Government would not oppose issuance of the writ of certiorari. The case presents the questions involved in *Duncan* v. *Kahanamoku*, No. 791, and *White* v. *Steer*, No. 792, in which certiorari was granted on February 12, 1945. It presents an additional issue arising from the findings of the District Court (R. 41) that the respondent carried the burden of proving that the petitioner pleaded guilty to the charge, as alleged in the return (R. 10); and that, on the evidence presented, this burden had not been sustained (R. 41, 42, 55). The latter issue does not appear to have been considered by the Circuit Court of Appeals, presumably because of the manner in which the cause was submitted to the court.[1] We assume that the ques-

[1] Counsel for both parties in the court below stipulated, subject to the approval of the court, "to submit the appeal * * * for decision on its record, without oral arguments and without the filing of further briefs, on the basis of the arguments and briefs heretofore made and filed" in the cases of *Duncan* and *White* (R. 339). The court thereupon entered an order as follows (R. 341): "Upon consideration of the stipulation of counsel for respective parties, and good cause therefor appearing, It Is Ordered that this cause be, and hereby is submitted to the Court for consideration and decision on oral arguments made and briefs heretofore filed" in the *Duncan* and *White* cases. Judgment was subsequently entered "upon the authority of" the decision of the court in the latter cases (R. 342).

tion would be open in this Court and agree that the findings of the District Court, if correct in the allocation of the burden of proof, would constitute an independent basis for sustaining the writ of habeas corpus.[2]

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

HERBERT WECHSLER,
Assistant Attorney General.

JOHN L. BURLING,
Special Assistant to the Attorney General.

MARCH 1945.

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[2] The petitioner's memorandum implies (pp. 2–3) that there was impropriety in the remission of his sentence after the petition for certiorari had been filed in this Court, stating that the "present case is simply one more in the long list of similar cases which have been mooted, or attempted to be mooted, prior to the submission of the issues to this Court." The allegations are irrelevant to the issues before this Court. A detailed reply, therefore, would in this forum be as inappropriate as the charge; but we do not believe that the insinuations should remain unnoticed with respect to the cases in this Court.

In this connection, the petitioner refers to three cases: *Zimmerman* v. *Walker*, 319 U. S. 744; *Ex parte Endo*, decided December 18, 1945; and *United States ex rel. Lynn* v. *Downer*, 322 U. S. 756. The Court is aware of the fact, brought to its attention in both the *Endo* and *Lynn* cases, that the jurisdictional questions there arose as a consequence of routine Governmental action taken without reference to the pendency of the litigation. With respect to the *Zimmerman* case, it is enough to state that those responsible for the conduct of the litigation on behalf of the Government were convinced of the correctness of the judgment of the Circuit Court of Appeals.

In the case at bar the Solicitor General advised the War

Department, properly it is believed, of his doubts as to the correctness of the decision below, in view of the problem raised by the findings of the District Court to which reference has been made in the text. The Solicitor General has been advised that these doubts were communicated to the Commanding General, but that the Commanding General has stated that other grounds for remission were taken into consideration by him.

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(6)

No. 841

IN THE

Supreme Court of the United States

FRED SPURLOCK, *Petitioner*,

v.

WM. F. STEER, Colonel, Infantry, United States Army, Provost Marshal, Central Pacific Area.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY MEMORANDUM FOR PETITIONER.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY MEMORANDUM FOR PETITIONER.

The memorandum of the Solicitor General in this case suggests that the cause has been mooted by a purported order of Lt. Gen. Richardson. We respectfully suggest that the cause is not thus made moot, or, in any event, that the issue as to mootness is so shrouded in doubt that it should not be decided until after briefs and argument.

The purported order of Gen. Richardson—issued, be it noted, *after* the filing of the petition for certiorari—is one "remitting the unexecuted portion of the petitioner's sentence" (Mem., p. 1). The order would seem to be void, since only the President may pardon or mitigate punishment ad-

judged by a court martial. The Attorney General has so ruled. 19 Op. Atty. Gen. 106. Consequently, the assertion by the Solicitor General that "petitioner is no longer subject to the respondent's custody" (Mem., p. 2) cannot be sustained; a void order cannot effect any change in petitioner's status. As indicative of the scope and nature of the purported order, and probably the haste with which it was issued, it may be noted that the Solicitor General does not indicate in his memorandum that the $500 bond required of petitioner (Mem., p. 2) has been cancelled or otherwise disposed of.

So far as we are aware, the opinion of the Attorney General states the law.[1] Certainly, under those circumstances, petitioner's case should not be dismissed. No recourse other than this proceeding is available to him by which he may determine whether his substantial rights have been, and are now, invaded. Moreover, the record in the instant case reflects in full measure the nature of martial law as administered in Hawaii, and will be of aid to the court in evaluating the underlying issues common to this case and the other cases in which certiorari has already been granted. Nos. 791 and 792, *Duncan* v. *Kahanamoku*, and *White* v. *Steer*, certiorari granted February 6, 1945.

The present case is simply one more in the long list of similar cases which have been mooted, or attempted to be mooted, prior to the submission of the issues to this Court. *E. g.*, Ex parte *Glockner* (unreported) No. H. C. 295 (D. C. Hawaii); Ex parte *Seifert* (unreported) No. H. C. 296 (D.

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[1] The cases cited by the Solicitor General (p. 2) are not to the contrary. In the *Tornello* and *Hudspeth* cases, the petitioners had been validly released from custody by a Presidential pardon, and an order of the United States Board of Parole, respectively. In the *Zimmerman* case, the petitioner had been held without trial, either by way of court martial or any other way; when he was released, the case was over. None of the cases bear upon the validity of an order such as that of Gen. Richarson, nor upon a case in which there remains outstanding, under the Attorney General's opinion, a portion of sentence imposed by a court martial.

C. Hawaii);[2] *Zimmerman* v. *Walker*, certiorari denied as moot, 319 U. S. 744;[3] *Wilcox* v. *De Witt*, (unreported) (S. D. Calif.); *cf.* Ex parte *Endo*, No. 70, decided December 18, 1945; *United States* ex rel. *Lynn* v. *Downer*, certiorari denied as moot, 322 U. S. 756, rehearing denied, January 2, 1945.[4] It is significant that the purported order here was issued even after the petition for a writ of certiorari had been filed.

We respectfully suggest, therefore, that the petition for a writ of certiorari be granted, and the cause set down for argument with the *Duncan* and *White* cases, *supra*. The issue of mootness may, if the Government so desires, be raised at that time.

Respectfully submitted,

FRANCIS M. BROOKS,
Counsel for Petitioner.

BRAHAN HOUSTON,
Of Counsel.
March 2, 1945.

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[2] The Memorandum filed in this Court by the Government in *Duncan* v. *Kahanamoku*, No. 791, Present Term, states (p. 15n): "These cases were dismissed by the District Court as moot because the petitioners, naturalized United States citizens of German ancestry interned as dangerous, were removed to the West Coast of continental United States and released."

[3] The same Memorandum states as to this case: "A petition for a writ of certiorari to review the legality of suspension of the privilege of the writ and the internment of another United States citizen as dangerous in Hawaii was denied by this Court on the ground that release of petitioner on the mainland made the case moot."

[4] The Government has not appealed adverse decisions in three cases involving alleged military necessity for action against citizens in the United States, though it has taken steps to prevent final judgments in any of the cases. *Schueller* v. *Drum*, 51 F. Supp. 383 (E. D. Pa.); *Ebel* v. *Drum*, 52 F. Supp. 189 (D. Mass.); *Scherzberg* v. *Grunert* (unreported) (E. D. Pa.).